No. 79-1144

In the Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,
Petitioner,
v.
RADCLIFF MATERIALS, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae

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Brief of Georgia-Pacific Corporation and Packaging Corporation of America as Amici Curiae

Georgia-Pacific Corporation ("Georgia-Pacific") and Packaging Corporation of America ("PCA") submit this brief as amici curiae in support of petitioner Texas Industries, Inc., and respectfully urge the Court to recognize rights of contribution among antitrust defendants. As set forth in this brief, Georgia-Pacific and PCA are keenly interested in the Court's resolution of the important issue before it in this case and are particularly well situated to be able to present to the Court certain considerations that, though highly pertinent to that issue, may not be fully developed by the parties.

INTEREST OF THE AMICI

Georgia-Pacific and PCA are two of the 37 defendants in *In re Corrugated Container Antitrust Litigation,* M.D.L. No.

310 (the *"Corrugated Litigation"*), which is a consolidated, multidistrict proceeding pending in the United States District Court for the Southern District of Texas, Houston Division. The *Corrugated Litigation* comprises more than 60 separate lawsuits, including both class action cases and cases commenced by plaintiffs who opted out of the plaintiff class certified in that litigation.[1] The *Corrugated Litigation* plaintiffs have alleged that the defendants engaged in a conspiracy to fix the prices of corrugated containers and corrugated sheets in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

The contribution issue was raised at an early stage in the *Corrugated Litigation*. Shortly after two of the defendants entered into settlement agreements with the class action plaintiffs, another defendant, Westvaco Corporation, sought leave of court to amend its previously filed answers to assert contribution cross-claims against those two settling defendants. After additional settlements were entered into, Westvaco filed an amended motion seeking leave of court to plead (1) contribution cross-claims against all other defendants that had settled and (2) an affirmative defense of claim reduction[2] based upon those settlements. At that time, Georgia-Pacific and PCA also moved the district court for leave to amend their respective answers to plead contribution cross-claims and defenses.[3]

[1] *See* In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244 (S.D. Tex. 1978), *mandamus denied*, No. 78-3684 (5th Cir. 1978).

[2] "Claim reduction" is a means to implement contribution under which a plaintiff's claim against a nonsettling joint wrongdoer is reduced proportionately to reflect the plaintiff's settlement with another who would have been jointly and severally liable with the nonsettling wrongdoer. Claim reduction should be an integral part of a rule of contribution in antitrust cases and this Court's disposition of the case now before it necessarily should include consideration of such a complete rule of contribution. *See* pp. 24-29 *infra*.

[3] A more complete description of the settlement history in the *Corrugated Litigation* is set forth in section I of the argument portion of this brief (pp. 6-14 *infra*).

The district court denied the motions to amend filed by Westvaco, Georgia-Pacific and PCA[4] and, on appeal from the district court's entry of judgment pursuant to rule 54(b) of the Federal Rules of Civil Procedure, the Court of Appeals for the Fifth Circuit affirmed that ruling in an unpublished, per curiam opinion.[5] On June 16, 1980, this Court granted the petition of Westvaco, Georgia-Pacific and PCA for a writ of certiorari to review the contribution ruling of the Court of Appeals in the *Corrugated Litigation* and to decide the same issue raised in the case *sub judice*—whether antitrust defendants may assert rights of contribution.[6] On October 20, 1980, however, this Court granted the motion of certain respondents to dismiss that writ of certiorari.[7]

The absence of established contribution rights in antitrust cases has had and continues to have direct impact upon Georgia-Pacific and PCA in the *Corrugated Litigation* and gives them a substantial interest in the contribution issue now before the Court. Both of these companies, as well as many others, have been victims of a denial of contribution rights in that litigation: though each of these companies firmly believed in its innocence of the allegations against it, each was compelled to settle with the *Corrugated Litigation* class action plaintiffs because of the inordinate damage exposure they

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[4]In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979).

[5]In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir., Oct. 30, 1979).

[6]Westvaco Corp., et al. v. Adams Extract Co., et al., No. 79-972. Subsequently, as part of a settlement agreement with the class action plaintiffs in the *Corrugated Litigation*, Westvaco agreed to discontinue its efforts to pursue the contribution issue in this Court.

[7]On December 15, 1980, the Court denied a petition for rehearing filed by Georgia-Pacific and PCA in No. 79-972. The various briefs filed by the petitioners in No. 79-972 prior to the Court's October 20, 1980, order in that case describe (with appropriate references to the joint appendix) the portions of the record in the *Corrugated Litigation* relevant to the contribution issue.

faced resulting from earlier settlements by virtually all other defendants in the absence of an established contribution rule. Moreover, the continued, direct interest of these companies in the recognition by this Court of the equitable doctrine of contribution in antitrust cases arises not only from the grossly unfair consequences already wrought in that litigation but also from the continued importance of the contribution issue in the *Corrugated Litigation* opt-out cases, which these companies are still actively defending and which are still in the pretrial discovery stage in the district court in Houston.

SUMMARY OF ARGUMENT

This Court should adopt an appropriate contribution rule for civil antitrust cases in order to promote justice and fairness. The rule of law denying contribution rights has been recognized as outmoded in nearly every other field of law, and there is no sound reason for rejecting this rule of fundamental fairness in antitrust cases. There is an obvious and compelling need to eliminate the opportunity for the kind of settlement abuse that became a reality in the *Corrugated Litigation* and other kinds of abuse that can occur in the absence of contribution.

The recognition of contribution rights in antitrust cases would eliminate such abuses and would foster a just system for the civil enforcement of the antitrust laws consistent with the underlying objective of those laws and with every defendant's right to a fair and realistic opportunity to litigate or settle claims against it on the merits of those claims. This Court and other courts have sought to avoid unwarranted overdeterrence from an unduly strict imposition of sanctions for violation of the antitrust laws. In treble damage actions, the staggering damage exposure that can result from a denial of contribution rights coupled with joint and several liability creates an unjustifiable measure of deterrence without furthering the legitimate objectives of the antitrust laws. Denial of contribution rights

creates underdeterrence of the most culpable antitrust violators, who can obtain sweetheart settlements or avoid suit altogether, while forcing the less culpable, as well as those defendants wrongly accused, to bear a disproportionate and inequitable share of damages. Rights of contribution achieve fair and properly balanced deterrence in the private enforcement of the antitrust laws.

The Court should not adopt a rule of contribution among defendants that would be unfair to settling defendants. In the context of partial settlements of antitrust cases, contribution and compromise of litigation can be harmonized by claim reduction. In horizontal price fixing cases, the plaintiffs' claims should be reduced by a proportionate amount based upon the sales of the products involved by settling defendants. This rule will not discourage fair settlements. This rule, however, does eliminate a frequently voiced objection to the recognition of contribution—that it will impede the settlement process—and will result in settlements that are related to the merits of the alleged claims as against each defendant.

ARGUMENT

Petitioner Texas Industries, Inc., can be expected to set forth in its brief numerous, compelling reasons for application of contribution principles in antitrust cases. Georgia-Pacific and PCA endorse those arguments, which are premised upon the inherent fairness of contribution and the beneficial effects that it can have in antitrust litigation. The case now before the Court, however, does not involve directly certain considerations that regularly arise in antitrust treble damage litigation: for example, this case does not involve allegations of antitrust violations in a major, nationwide industry where the private plaintiffs' blunderbuss pleading tactics bring virtually all major participants in the industry into the litigation; similarly, this single-defendant litigation does not present the question of the

impact of contribution on the settlement process and how contribution can and should be implemented where settlements occur in multi-defendant litigation. The *Corrugated Litigation* provides this background, which the Court should consider when it resolves the important contribution issue.

I. The Absence of Contribution and Claim Reduction in Antitrust Litigation Creates Grossly Inequitable Settlement Coercion on Defendants

The settlement history in the *Corrugated Litigation* starkly illustrates the extreme settlement abuse that results from the absence of contribution rights.

In fact, the *Corrugated Litigation* has repeated again the pattern in antitrust litigation that has become all too familiar over the last decade. First, prior to the completion of a widely publicized grand jury investigation of an industry, class actions and individual lawsuits are brought premised on the existence of the investigation against every substantial member of the industry.[8] Then, the grand jury returns indictments of only a few members of the industry.[9] As the civil actions continue against all defendants, the certification of a large class results in

[8]The Houston grand jury investigation of the corrugated industry, the publicity of which spawned the *Corrugated Litigation* while the grand jury was still sitting, became widely known more than a year before any indictments were returned. *See, e.g.*, Wall Street Journal, Oct. 26, 1976, at 28 (S.W. ed.). In such circumstances, members of the plaintiffs' bar, drawn by the prospect of quick settlements and lucrative attorneys' fees, engage in a rush to the courthouse in order to achieve a foothold on a desired forum for multidistrict litigation purposes and a leadership position among plaintiffs' counsel. *See, e.g.*, Rudnitsky & Blyskal, *Getting Into Those Deep Pockets*, Forbes, Aug. 4, 1980, at 59-62.

[9]Georgia-Pacific and PCA, along with most of the 37 civil defendants, had produced vast quantities of documents to the Government in response to subpoenas issued as part of the Houston grand jury investigation. The first *Corrugated Litigation* treble damage class actions were filed in March 1977, fully ten months before the results of the grand jury investigation were to become known. Neither Georgia-Pacific nor PCA was indicted by the Hous-

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each defendant being faced with potential liability of billions of dollars.[10] Consequently, quick but inequitable settlements having little or nothing to do with the merits are forced upon many of the defendants because plaintiffs, by divide and conquer "game theory" tactics, exploit a no-contribution, no-claim-reduction rule.

To implement their settlement strategy, the class action plaintiffs in the *Corrugated Litigation* had assigned to each defendant a number of "points" corresponding to each defendant's percentage share of all defendants' sales of corrugated containers and sheets over a period of several years. Prior to a ruling on the then pending motion for class certification, the class action plaintiffs sought and obtained "ice-breaking" settlements with two large defendants, St. Regis Paper Company, an unindicted company, and International Paper Company, which had been charged with a felony and subsequently pleaded nolo contendere, for approximately $500,000 and $1 million "per point," respectively.[11] Subsequently, after the dis-

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ton grand jury, which ultimately indicted fourteen companies in the industry. Georgia-Pacific and three other *Corrugated Litigation* defendants were not even referred to in the part of the Government's bill of particulars that listed over 600 alleged coconspirators identified as a result of the exhaustive, eighteen-month Houston grand jury investigation. In fact, Georgia-Pacific was identified as one of the accounts alleged to have suffered damages. Thus, the grand jury and the Government prosecutors who ran the investigation presumably did not believe that Georgia-Pacific was a participant in the alleged conspiracy. Subsequently, the jury in the recent class action trial against The Mead Corporation specifically found that Georgia-Pacific had not participated in the alleged conspiracy.

[10]In the *Corrugated Litigation*, plaintiffs' initial estimates of the damages claimed ranged up to almost $6 billion. Plaintiffs more recently have estimated that the judgment against The Mead Corporation—the only defendant to go to trial through verdict in the class action cases—could be as much as $1 billion, based upon a damage period much shorter than the 18-year period for which they have sought damages.

[11]Treble damage plaintiffs are induced to offer several early, discounted settlements to those defendants they believe to be most culpable in order to

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trict court certified a nationwide class of purchasers of corrugated containers or sheets, the plaintiffs concluded a settlement agreement with Union Camp Corporation, an unindicted company, for $2 million per point, an amount that was twice as much per point as had been paid by International Paper, an indicted company.

The Union Camp settlement triggered a "settlement stampede." Within two weeks, plaintiffs concluded eight additional settlements at successively higher amounts ranging up to $4.5 million per point for indicted companies and up to $2.75 million per point for unindicted companies. Settlements continued to be offered at increasingly higher amounts, and during the next few weeks nine more settlements were reached totalling more than $210 million. With each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate per point than prior settlements.

Plaintiffs were able to escalate their settlement demands because, with joint and several liability and in the absence of contribution and claim reduction, the exposure faced by each

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capitalize on the "ice-breaking" effect of such settlements on other defendants who are, solely by reason of such settlements, faced with a substantially increased damage exposure. The logical tendency of defendants who recognize their culpability to seek early settlement in order to avoid adding substantial litigation costs to the readily perceived future burden of having to respond in damages supports the observation that "the early-settling defendants may well be those whose liability is clearest." Manual for Complex Litigation § 1.46, at 63 (1977). Moreover, the most culpable antitrust violators are induced by a no-contribution rule to seek early sweetheart settlements that will be relatively inexpensive and will enable them to retain a substantial portion of the benefits of their unlawful conduct, while leaving less culpable or wrongly accused defendants to bear the burdens of potential liability for all defendants' conduct. A no-contribution, no-claim-reduction rule enables plaintiffs to obtain settlements with the most culpable defendants, while their total damage claim against nonsettling defendants remains virtually unaffected. These undisputed consequences of a denial of contribution rights wholly distort the deterrent function of treble damage litigation. *See* pp. 22-23 *infra*.

nonsettling defendant increased with each successive settlement. The amount of each settlement was determined by the timing of other settlements rather than by the merits of the case against each defendant.[12] Certain unindicted defendants, confident of their innocence, nevertheless were compelled by economic pressures to accede to plaintiffs' settlement demands in order to avoid the loss of credit or in order to continue operations. For example, U.S. Corrugated Fibre Box Company was not indicted. Although it had the smallest market share of all *Corrugated Litigation* defendants, U.S. Corrugated settled at a rate per point eight times higher than St. Regis and four times higher than International Paper. In dollar terms this was equivalent to U.S. Corrugated's after-tax profits for three and one-half years. As a result, the company was forced to close one of its plants, laying off 200 employees. Green Bay Packaging Corporation, another one of the small *Corrugated Litigation* defendants, had resolved to vindicate its innocence at trial because it believed it had done nothing wrong. After other defendants settled, however, Green Bay, a family-owned business, was faced with the loss of its line of credit unless it resolved its contingent liability. To remain viable, Green Bay

[12]That the class action plaintiffs' settlement demands in the *Corrugated Litigation* increased as a direct result of the effect of the no-contribution, no-claim-reduction rule is indisputable. As early as December 1978, after only two defendants had settled and only days before the settlement stampede began, the district court rejected conditioning approval of the two settlements before it upon claim reduction. During December 1978 and January 1979, the time of the vast majority of the settlements, there was no significant change in circumstances, other than the impact of the denial of contribution rights on the damage exposure facing remaining defendants brought about with each settlement, that can explain the plaintiffs' ability to demand and obtain ever-increasing settlement amounts. Moreover, these settlements occurred before a single deposition had taken place in the litigation. Indeed, the only other significant event during that time period was the district court's division of the plaintiff class into two subclasses, but that occurrence further demonstrates the striking *in terrorem* effect of the absence of contribution rights, as defendants continued to pay higher and higher amounts even though their settlements, unlike earlier ones, did not settle claims of the entire plaintiff class.

had no choice but to accept plaintiffs' demand for $3.75 million per point. Plaintiffs threatened to increase this amount if settlement were delayed. As George Kress, the founder and president of Green Bay, stated:

> The effect of this extortive settlement practice upon a small, family-owned and managed business is catastrophic. We were threatened with the loss of over fifty years of effort, and coerced into paying an exorbitant settlement rather than being afforded the privilege of ultimately proving our corporate innocence.

Testimony of George Kress before United States Senate Judiciary Committee, Subcommittee on the Constitution. In the subsequent class action trial against The Mead Corporation, the jury found that neither U.S. Corrugated nor Green Bay had participated in the alleged conspiracy.[13]

Thus, before even one deposition had been taken in the *Corrugated Litigation,* twenty-four indicted and unindicted defendants collectively had paid more than $288 million in settlement during a brief, five-week period. Subsequent settlements brought the total amount paid to well more than $300 million, which has been said to be the largest settlement in the history of antitrust litigation.

The reason for such a settlement stampede is most dramatically reflected by the *Corrugated Litigation* trial judge's own observation, after personally supervising those settlement proceedings, that it was "indisputable" that the enormous damage exposure resulting from the absence of contribution

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[13]Other examples of settlement extortion abounded in the *Corrugated Litigation*. For example, The Continental Group, Inc., which was later acquitted in the companion criminal case, settled at a rate six and one-half times greater than the rate paid earlier by International Paper. Container Corporation of America was charged with a misdemeanor. Despite its having a market share virtually identical to International Paper's, it paid $34.2 million or more than four times the amount paid by felony-indictee International Paper.

"is inherently coercive," so that "[e]ven a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial."[14] This statement echoed similar concerns expressed by this and other courts about the coercive effects of the staggering damage exposure in antitrust and other large class action cases resulting in strong disincentive for defendants to contest antitrust claims against them.[15] Such settlements could not have been achieved by the plaintiffs were it not for the coercive effect of the no-contribution, no-claim-reduction rule that confronted each defendant with the Hobson's choice of risking potential multi-billion-dollar, industry-wide damages or capitulating to extortionate settlement demands.

Similarly, notwithstanding that the Houston grand jury had not implicated Georgia-Pacific in any way, the settlement terms offered to that defendant in the time period of the

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[14] 84 F.R.D. at 41.

[15] *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); Reiter v. Sonotone Corp., 442 U.S. 330, 345-46 (1979) (Rehnquist, J., concurring); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) (potential treble damage award of $750 million against a single defendant because of alleged joint and several liability in antitrust class action viewed as an "outrageous" amount that "would shock the conscience"); Hooley v. Red Carpet Corp. of America, 1975-1 Trade Cas. ¶ 60,285, at 66,112 (D. Ore. 1975), *appeal dismissed*, 549 F.2d 643 (9th Cir. 1977) (enormous risk of class-wide treble damage liability "may well result in some or all of the defendants opting for a settlement . . . whether they were guilty of the plaintiffs' allegations or not."). These same considerations that have led courts to question the propriety of class certification where it creates an enormous risk of damage exposure, carrying "to an absurd and stultifying extreme" the private enforcement remedies prescribed by Congress (Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D.N.Y. 1972)), are equally applicable to the no-contribution rule. That rule likewise seeks not merely to impose punishment for a wrongdoer's "own malefactions . . . [but] to subject him to vicarious liability . . . for the staggering damages of the multitude . . . . At some point the logic of the law leads . . . to an ad absurdum result." Kline v. Coldwell, Banker & Co., 508 F.2d at 235.

settlement stampede and for a long period thereafter were, on a take-it-or-leave-it basis, the same escalating demands available to all unindicted defendants. For settlement negotiation purposes, the plaintiffs grouped the defendants into three classifications—felony-indicted defendants, misdemeanor-indicted defendants and unindicted defendants—and they refused to deviate from their increasing, multi-million-dollar "per point" demands established for members of each group. Consequently, unless it wished to capitulate to these extortionate demands, Georgia-Pacific, believing in and anxious to demonstrate its innocence, could only stand by and watch the potential multi-billion-dollar damage exposure confronting it escalate with each successive settlement. Moreover, avoidance of the inordinate burdens of defending such massive litigation at that stage other than by settlement was not possible, even for a defendant in Georgia-Pacific's position, as illustrated by the district court's curt denial of the motion for dismissal of the case against it filed by one of the other three *Corrugated Litigation* defendants that had not been indicted or alleged to be a coconspirator in the companion criminal cases.[16]

Only after the *Corrugated Litigation* class action cases had proceeded almost to the eve of trial, after more than a year of further extensive and costly pretrial proceedings including the Court of Appeals' denial of efforts to assert contribution

[16]That motion, requesting a dismissal without prejudice, was premised upon the undisputed ground that the company had been named as a defendant solely because it was a substantial member of the industry being investigated by the grand jury and because plaintiffs presumably were aware that it had received a subpoena *duces tecum* in the grand jury investigation. The district court ruled that, even in such circumstances, such a defendant could be forced to remain in the case while the plaintiffs searched for evidence of their then unsupported claim. The court stated:

> . . . Every day we deal with people that just come in and file a lawsuit and then decide they don't have any grounds for it, and my answer has been and always, I think, probably will be, well, that's just well and good, but let's engage in the discovery process and then if they can't find any facts, [the defendant can move to dismiss].

Transcript of Proceedings, In Chambers Conference, Feb. 2, 1979, at 56-57.

rights in that litigation, was a settlement offered to Georgia-Pacific that was reluctantly deemed acceptable, though extremely costly, in light of the risk of having to share with a handful of other companies the immense consequences of an unlikely, yet nonetheless possible, adverse judgment based upon the alleged wrongdoing of an entire industry.[17] The extraction of such multi-million-dollar settlements from such defendants, believing in their innocence but forced to forego a trial on the merits because of these unwarranted risks, is demonstrably unfair and unjust.

As the history of the *Corrugated Litigation* makes clear, the lack of contribution rights does not result in negotiation of settlements based upon a reasoned evaluation of the risks and merits of each party's case; rather, settlement amounts are

[17]Georgia-Pacific, along with two other defendants, agreed to pay a total of $3 million in order to settle the claims of the plaintiff class against them. Georgia-Pacific first entered the corrugated container industry in the early 1960's and its sales of corrugated products today amount to less than three percent of industry sales, with a substantial portion of the *Corrugated Litigation* defendants having larger market shares than Georgia-Pacific. Although the amount Georgia-Pacific agreed to pay was much less than that paid by many other defendants in the *Corrugated Litigation*, such an amount is still exorbitant where the payment is made for claims that are believed to be unfounded and are found as such by a jury. Nevertheless, such a settlement presented the opportunity for Georgia-Pacific to avoid the tremendous and ever-increasing costs of defense of the massive class action cases, including a several-month trial, and to protect against the potentially devastating, albeit extremely remote, risk of an adverse judgment in the class action trial.

The history of the *Corrugated Litigation* also demonstrates that the consequences of litigating rather than settling can be staggering to a defendant in the absence of established contribution rights. In the *Corrugated Litigation*, The Mead Corporation, the only defendant to go to trial through verdict in the class action cases, stands to bear the consequences of a potential judgment of close to $1 billion based on sales of twenty companies, even though Mead has a market share of less than three percent and was acquitted in the companion criminal litigation after only three hours of jury deliberation following a three-month trial. *See also* Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995, at 79,700 (10th Cir. 1979)(Olson Farms, with only 11 percent market share, alone suffered $2.4 million judgment based on purchases of all five participants in alleged conspiracy).

related to the timing of other settlements and to the plaintiffs' ability to capitalize on a "game theory" that, though proved to be mathematically sound, bears none of the hallmarks of the justice that our courts are to dispense.[18]

II. Contribution Rights Are Particularly Appropriate for Antitrust Cases

The archaic approach prohibiting contribution has been repudiated in nearly every other area of the law,[19] and there is no sound reason for precluding adoption of such rules of fundamental fairness in antitrust cases. Indeed, the legitimate objectives of the antitrust laws are better served by allowing

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[18]In *In re Folding Carton Antitrust Litigation*, M.D.L. No. 250 (N.D. Ill.), the class action plaintiffs went so far as to retain an expert mathematician to support settlements in that litigation by expounding upon the virtues of their "game theory" of seriatim settlement negotiation to capitalize on the inherent harshness of the no-contribution rule to antitrust defendants. As this expert observed:

> [P]ursuit of such a strategy, absent special considerations such as ability to pay, will lead to an increasing series of relative settlements by each of the defendants. This is primarily due to the fact that as more individual settlements are made the maximum potential damages payable by each of the remaining non-settling defendants increases.

Affidavit of Martin Shubik, Dec. 4, 1978, at 2-3. Simply put, settlements are extracted not on the basis of the merits or lack of merits of the case against a particular defendant but rather as a direct consequence of the coercive effect of a rule of law that does not allow equitable apportionment of damages. Not coincidentally, Georgia-Pacific, one of the last defendants to settle in *Folding Cartons*, was compelled to pay a half-million dollars in settlement in that litigation even though, in the plaintiffs' own words, this company was "notable for its absence from any conspiratorial involvement...." In re Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill.), Memorandum of Class Plaintiffs in Support of the Proposed Settlements and Proposed Plan of Distribution, July 9, 1979, at 64.

[19]*See, e.g.*, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974)(non-collision maritime case); Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979)(securities law case); Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980)(employment discrimination case); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)(airline disaster litigation); Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968)(negligence case); Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962)(negligence case).

contribution, which results in antitrust defendants' facing damage exposure for the consequences of their own acts. Because of the possiblilty of overdeterrence and the substantial disincentives defendants face in litigating antitrust actions on the merits, this Court should be extremely sensitive to impairment of basic rights brought about by denial of a contribution rule of fairness in antitrust litigation.

In this case, the Court of Appeals for the Fifth Circuit based its denial of contribution rights in part on its perception of the "chilling effect" of the "threatening specter of sole liability" that will cause businesses "necessarily [to] steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression." *Wilson P. Abraham Constr. Co. v. Texas Industries, Inc.*, 604 F.2d 897, 905 (5th Cir.), *en banc rehearing denied*, 608 F.2d 524 (1979), *petition for cert. granted sub nom. Texas Industries, Inc. v. Radcliff Materials, Inc.*, No. 79-1144, 49 U.S.L.W. 3321 (Nov. 3, 1980). To premise a no-contribution rule upon such reasoning, however, not only reflects a serious misconception of the antitrust laws but also conflicts with principles of antitrust enforcement enunciated by this Court.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court cautioned against overdeterrence from a too-strict imposition of criminal sanctions for conduct that violates the antitrust laws:

> [T]he behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. *The imposition of* criminal *liability* on a corporate official, or for that matter on a corporation directly, *for engaging in such*

> *conduct which only after the fact is determined to violate the statute because of anticompetitive effects,* without inquiring into the intent with which it was undertaken, *holds out the distinct possibility of overdeterrence;* salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.

Id. at 440-41 (emphasis supplied)(footnote omitted).[20] These same concerns apply to treble damage civil litigation; indeed, potential treble damage exposure, when magnified even further by a denial of contribution rights, often dwarfs the sanctions that can be imposed for criminal antitrust violations and can result in equally improper overdeterrence. As the Court of Appeals for the Third Circuit recently warned, "the judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws.... [C]ourts have been wary of permitting 'overkill' recoveries, whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect on competition." *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 587 (3d Cir. 1979)(footnotes omitted).

As the supposed easy answer to the proponents of contribution rules in antitrust cases, it is often said that antitrust violators are intentional wrongdoers who need not be accorded fair treatment. *See, e.g., Wilson P. Abraham Constr. Co. v. Texas Indus., Inc.*, 604 F.2d 897, 900 & n.5, 905 (5th Cir. 1979);

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[20] As the Court noted:

> [W]here the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose.

438 U.S. at 442 n.17.

Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas ¶ 62,995, at 79,701 (10th Cir. 1979), *en banc rehearing granted and pending* (Dec. 27, 1979). Numerous factors, however, including the concerns expressed by this Court in *Gypsum*, demonstrate that antitrust defendants are in fact entitled to fair treatment and should not blithely be prejudged and condemned, as opponents of contribution rules would do, as villainous perpetrators of "heinous" crimes against society who are undeserving of rules of fairness.[21]

Significantly, a denial of contribution rights reaches beyond those who clearly have violated the antitrust laws and dramatically affects the rights of defendants named in treble damage litigation who are innocent of the alleged violation or who are, at most, marginally culpable.[22] Such defendants, who may have been sued without any legitimate basis and nonetheless face the burdens of defending complex, protracted and exceedingly expensive litigation, are placed by a no-contribution, no-claim-reduction rule in the position of having to pay enormous amounts, unrelated to their conduct, to settle or risking the possibility, however slight it might be, of being subjected to a decimating judgment.[23]

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[21]The plaintiffs in the *Corrugated Litigation* thus offered numerous epithets to describe the alleged conduct of defendants in that case. *See, e.g.*, In re Corrugated Container Antitrust Litigation, No. 79-2439 (5th Cir.), Brief for Plaintiffs-Appellees at 20 ("[a] scheme to bilk corrugated container consumers of billions of dollars"); at 22 (contribution would "give relief to the conspirators who deliberately engaged in price-fixing schemes to injure the nation's free market economy"); at 26 (claim reduction is not fair "to the innocent victims of defendants' heinous acts").

[22]Particularly in antitrust conspiracy cases, the possibility of liability for very minimal involvement in the alleged wrongful conduct exists and proof in such cases is often largely circumstantial and based on inference. *See, e.g.*, United States v. Consolidated Packaging Corp., 575 F.2d 117, 126-27 (7th Cir. 1978).

[23]Clearly "false [is] the notion that every antitrust defendant, without exception, is guilty as charged in a private complaint." Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Anti-Trust Review*, 71 Columbia L. Rev. 1, 9 (1971).

Deference to the deterrence objectives of the federal antitrust laws already has led to stated judicial reluctance to permit any impediment to possibly meritorious private antitrust claims by the granting of summary pretrial rulings.[24] As a result, naming defendants in a blunderbuss fashion is now commonplace so that the marginally culpable and innocent are forced to defend such cases. As dramatically illustrated by the settlement history of the *Corrugated Litigation*, a denial of contribution and claim-reduction rights has tipped the balance of litigation advantage so far to the side of treble damage plaintiffs and so far against such defendants that, although settlements are the inevitable result, such compromises legitimately cannot be described as fair or desirable. As this Court observed in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975): "[A] rule of fairness in court will produce fair

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[24]Summary pretrial adjudications in antitrust cases are strongly disfavored. *E.g.*, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); *see* pp. 11-12 *supra*. This principle graphically illustrates the practical burdens that are placed upon a company simply because it has been named as a defendant in treble damage litigation, even if the charges against it are totally baseless. For example, in *Folding Cartons, Inc. v. American Can Co.*, No. 76C1113 (N.D. Ill.), a magistrate, after hearing, found that a group of defendants, including Georgia-Pacific, had been joined almost two years after the original complaint was filed simply as a tactical ploy to seek to overcome an objection to the adequacy of the plaintiff's class representation because it had not initially sued all of its suppliers of the product in question. The magistrate found it undisputed that "neither plaintiff nor his attorney could have held an honest belief that there were good grounds to support antitrust claims against these six defendants." Memorandum in Support of Report and Recommendation on Certain Defendants' Motions to Dismiss, July 27, 1979, at 13-16; *see* Fed. R. Civ. P. 11. Nevertheless, the district court in that case rejected the magistrate's recommendation to dismiss the complaint without prejudice. The court concluded that even that limited relief was not appropriate because the complaint was "neither demonstrably false nor preposterous on [its] face." Slip Op., June 16, 1980, at 2. Even though there was "virtually nothing to suggest that any kind of review of the pricing practices of these defendants was pursued before they were embroiled in the litigation" (*id.* at 4), the court left the defendants only the hollow hope of seeking sanctions if the plaintiff's allegations later proved to be without substance.

out-of-court settlements."[25] The unfairness of the absence of contribution rights, on the other hand, quite clearly causes the kind of settlements that should not be fostered.[26]

In addition to the wrongly accused, even those defendants who have actually violated the antitrust laws may not properly be classified as a group of litigants who do not deserve judicial rules of fairness. Undeniably, antitrust violations can strike substantial blows to our economic system, and certain antitrust violations, carried out with the requisite state of mind, can subject the violators to serious criminal penalties. 15 U.S.C. §§ 1, 2; *see United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978). Nevertheless, it is widely recognized that antitrust law is one of the most complex, changeable and uncertain areas of substantive law in American jurisprudence. As this Court has stated: "The Sherman Act... does not, in clear and categorical terms, precisely identify the conduct which it proscribes.... Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct

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[25]Promoting a denial of contribution rights as a means to induce compromise of litigation ignores the principles of fairness and justice that undergird such rights,

> [f]or, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

421 U.S. at 408.

[26]The *Corrugated Litigation* provides but one example of the kinds of litigation abuse engendered by a denial of contribution rights. A no-contribution, no-claim-reduction rule just as clearly can legitimatize selective private enforcement of the antitrust laws based upon considerations such as the treble damage plaintiff's whim or collusion with others, as exhibited by the plaintiff's decision in this case to sue only Texas Industries, which was just one of four companies indicted for the alleged antitrust violation in question. *See also* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979), *en banc rehearing denied* (Apr. 17, 1979).

which the statute omits...." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978). *See also Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936).

The relative costs and benefits to our economy resulting from conduct that may run afoul of the antitrust laws are frequently difficult to discern and often are hotly debated.[27] Moreover, the amount and impact of damages that may flow from anticompetitive conduct, particularly allegedly supra-competitive prices, are especially difficult to ascertain.[28] Even in cases of so-called "price-fixing," which has long been held to be *per se* unlawful, the borderline between what is and what is not unlawful under this *per se* rule often is extremely obscure.[29] Accordingly, as this Court recognized in *Gypsum*, the inherent uncertainty of the standards of illegality and of the consequences flowing from conduct proscribed under the antitrust laws does not permit easy categorization of such conduct as right or wrong.

In fact, the historical genesis of the *Corrugated Litigation* provides an example of such uncertainties and demonstrates the obscurity of the line of demarcation between right and wrong under the antitrust laws, even in horizontal price-fixing cases. Thus, the kind of conduct that has formed the core of plaintiffs' claims in the *Corrugated Litigation* is the alleged exchange of price information among competitors. Such conduct is not unlawful *per se* as it "does not invariably have

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[27] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61, 375-77 (1933).

[28] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731-33, 736-45, *rehearing denied*, 434 U.S. 881 (1977); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-66 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931).

[29] *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 7-9, 13 & n.24 (1979), *on remand*, 620 F.2d 930 (2d Cir. 1980).

anticompetitive effects." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 & n.16 (1978). Under a 1940 consent decree entered into by many members of the corrugated container industry long before Georgia-Pacific and certain other *Corrugated Litigation* defendants entered that industry, certain forms of communication of price information between competitors, including exchanges of past and certain current price information, were permitted and hence presumably were believed to be acceptable under the antitrust laws. *United States v. National Container Ass'n*, 1940-1943 Trade Cas. ¶ 56,028, at 85-86 (S.D.N.Y. 1940); *see United States v. Container Corp. of America*, 273 F. Supp. 18, 28-30 (M.D.N.C. 1967). Then, in proceedings leading up to this Court's decision in *United States v. Container Corp. of America*, 393 U.S. 333 (1969), the Government first empaneled a grand jury to investigate these practices and then filed a civil injunction suit alleging an unlawful "price-fixing" agreement based upon, *inter alia*, such exchanges of price information in this industry. That proceeding resulted in a district court determination that the conduct in question was not unlawful; in the *Container* decision, however, this Court concluded, with three Justices dissenting, that such conduct violated section 1 of the Sherman Act. In the *Corrugated Litigation*, the plaintiffs, embracing the findings and rulings of this Court in *Container* and seeking damages for sales by defendants as far back as the early 1960's, have sought in part to impose treble damage liability on defendants for conduct of more than a decade ago even though that conduct first was believed possibly to be unlawful only after a landmark decision of this Court years after the conduct took place.

In sum, it is no answer to the problem of unfair treatment resulting from a denial of contribution rights to say that the class of persons to be protected, that is, antitrust defendants, are such "wrongdoers" that they simply do not deserve fair treatment. To the contrary, their fair treatment by adoption of a contribution rule not only is appropriate because of the

nature of the antitrust laws but also because that rule of fairness will foster proper deterrence of antitrust violations.[30]

Significantly, contribution will result in punishment of the most culpable antitrust violators. The motivations for selective private enforcement of the antitrust laws have been exhibited in this and other recent antitrust cases in which contribution rights were sought.[31] Without contribution rights to apportion

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[30]Private antitrust remedies, like private enforcement tools in the securities laws, are designed to serve essentially the same goals of deterrence and providing an incentive to institute private enforcement actions. Contribution has been found to serve such purposes well under the securities laws, even for "intentional" violations. *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979); Globus, Inc. v. Law Research Service, Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). A report of the Section of Antitrust Law of the American Bar Association recently observed:

> [M]any antitrust suits do not involve "intentional" behavior in the usual sense of that word.... The case law is replete with examples of good faith efforts to comply with the antitrust laws that were later held unlawful. [*citing United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); *Simpson v. Union Oil Company*, 377 U.S. 13 (1964).] Finally the existence of "intention" is itself a somewhat elusive concept, particularly when applied in the context of vicarious employer liability for the acts of employees. Antitrust defendants are often companies whose employees are alleged to have committed intentional acts which violate company policy as much as they violate the antitrust laws. Whatever the wisdom of making an employer strictly liable for civil injuries in such circumstances, under no rational scheme of analysis can it be said that such injuries are the product of the "intentional" tort of the company.

American Bar Ass'n, Section of Antitrust Law, *Resolution and Report of the Section of Antitrust Law of the American Bar Association on Proposed Amendment of the Clayton Act to Permit Contribution in Damage Actions Brought Thereunder*, Aug. 17, 1979, at 6-7.

[31]*E.g.*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979)(recognizing potential, as alleged in that case, for large or powerful violator to exert economic influence to keep plaintiff from seeking damages from it); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995, at 79,706 (10th Cir. 1979) (Holloway, Cir. J., concurring and dissenting) (recognizing the "potential of a plaintiff deliberately choosing to sue a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties").

liability, moreover, the most culpable wrongdoers are not properly deterred because, even if sued, they can seek early sweetheart settlements, enabling them to retain much of the fruits of their unlawful conduct while shifting the burden of damage liability for their conduct onto the less culpable or innocent defendants. Treble damage plaintiffs are encouraged to capitalize on the bargain nature of such defendants' settlements while retaining virtually the entirety of their claims to press against remaining defendants, aided by the inherently coercive nature of the increases in damage exposure resulting from the early settlements.

Thus, a no-contribution, no-claim-reduction rule, which has been exhorted largely as a rule designed to promote deterrence of wrongdoing *(e.g., Wilson P. Abraham Constr. Co. v. Texas Industries, Inc.,* 604 F.2d 897, 901, 905-06 (5th Cir. 1979)), in fact turns the deterrence objective of the antitrust laws on its head. Under such a rule, the most culpable violators, because of factors wholly extraneous from considerations of who is most deeply at fault, can get off "scot free" or, at most, having to disgorge only a small part of their gains from their unlawful conduct. The largest exaction of damages, by trial or settlement, is left for the less culpable or innocent defendants, whose involvement in the unlawful conduct may have been only peripheral or nonexistent. A court-made rule of law can thus be turned into a tool for collusion, coercion and unfairness. Contribution rights, on the other hand, ensure that antitrust violators cannot escape or substantially limit treble damage liability. Even-handed deterrence that properly reflects the goals of private antitrust enforcement is achieved by contribution. Fair apportionment of damage liability "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others." *United States v. Reliable Transfer Co.,* 421 U.S. 397, 405 n.11 (1975).

III. Contribution and Claim Reduction Promote Fairness in Antitrust Litigation

Contribution principles are rules of equity designed to promote fairness and justice. Many courts, including this Court, have sought to achieve the paramount objective of fairness in litigation by adopting rules of contribution, recognizing that any other rule is simply unfair and unjust. As this Court stated in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974):

> [A] "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

Id. at 111, *quoting The Max Morris*, 137 U.S. 1, 14 (1890).[32]

Georgia-Pacific and PCA firmly believe that contribution will in fact enhance deterrence of wrongdoing and will promote the other objectives of private enforcement of the antitrust

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[32] *See also* Glus v. G.C. Murphy Co., 629 F.2d 248, 252 (3d Cir. 1980) ("It is now widely recognized that fundamental fairness demands a sharing of the liability."); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979) ("There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone. . . ."); Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979) (contribution results in a "'more equal distribution of justice'"); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (there is an "obvious lack of sense and justice" in a no-contribution rule); Gomes v. Brodhurst, 394 F.2d 465, 467 (3d Cir. 1968) (contribution is "a rule of reasoned fairness").

As the Court of Appeals in *Gomes*, adopting contribution in the settlement context, observed:

> There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations.

394 F.2d at 467-68.

laws. Nevertheless, in the final analysis, it is, and should be, the judicial sense of fairness, equity and justice that counsels most compellingly for adoption of contribution in the antitrust arena just as in other substantive fields of the law. "The deciding factor...is fairness between the parties." *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979). *See also Heizer Corp. v. Ross*, 601 F.2d 330, 333 (7th Cir. 1979).

Implementing the "equal distribution of justice" brought about by contribution necessarily requires appropriate application of that rule in a manner that will not unfairly impact upon the settlement process, for it would make no sense to adopt a rule of fairness as between defendants that would operate unfairly as to settling defendants. Even though the case now before the Court does not involve settlements, Georgia-Pacific and PCA do not believe this Court should address the contribution issue without considering the means for its implementation where settlements have been reached. Claim reduction allows the implementation of the equitable doctrine of contribution in a manner that preserves the essential underpinning of that doctrine—the fair apportionment of liability among joint wrongdoers—while eliminating the oft-stated concern that contribution would impede compromise of litigation. Hence, although claim reduction is not directly before the Court in this litigation, it should be a highly pertinent consideration in this Court's deliberations over the contribution issue.

Claim reduction, or a proportionate reduction of a plaintiff's claim against nonsettling defendants to reflect the portion of the plaintiff's claim he has settled with jointly and severally liable codefendants, is an equitable rule of contribution that has been applied in the settlement context and is an essential part of a contribution rule for antitrust cases involving alleged joint wrongdoing. Under this equitable contribution rule, the plaintiff's claim is adjusted to reflect his partial settlement of

that claim and nonsettling defendants' contribution claims against settling defendants are satisfied. In this way, all parties are accorded fair treatment: settling defendants are relieved of exposure to contribution claims, nonsettling defendants are not forced to shoulder an inordinate exposure to damages swollen solely by reason of the fact that codefendants have settled, and the plaintiff "cannot complain of unfairness, since '. . .the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer.'" *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 93, 110 A.2d 24, 37 (1954) (Brennan, J.), *quoting McKenna v. Austin*, 134 F.2d 659, 666 (D.C. Cir. 1943).[33]

In other substantive areas of the law in which contribution rights have been applied, courts have properly balanced the principles of contribution and compromise through claim reduction. In *Gomes v. Brodhurst*, 394 F.2d 465 (3d Cir. 1968), for example, the Court of Appeals for the Third Circuit held that the plaintiff's judgment against a non-settling defendant was to be reduced by an amount that reflected the settling tortfeasor's respective share of fault. *Id.* at 468-69.[34] As the court in *Gomes* recognized, this rule was designed to implement "a system which provides for the equitable distribution of liability for joint fault and yet encourages out-of-court settle-

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[33] *See also* Gomes v. Brodhurst, 394 F.2d 465, 467-70 (3d Cir. 1968); Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962); Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764, 767-68 (Tex. 1964).

[34] Claim reduction in *Gomes* was viewed as the proper resolution of the issue of the "extent, if at all, [to which] the judgment against appellant [should] be reduced to reflect any right of contribution he might have." 394 F.2d at 467. The court approached this issue of Virgin Islands common law with full recognition that the result "should be consistent with the long-standing policy considerations underlying any system of contribution: the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.*

ments.... The fairness of such a system is evident." *Id.* at 468. Similarly, in *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962), the court concluded that claim reduction was the most sensible means of reconciling the possible conflict between the inherent justice of the contribution doctrine and the injured party's right to settle its claim with less than all of the parties who have caused him harm. *Id.* at 723-24. Fairness to all litigants was the court's paramount objective.[35]

In *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954), the court, by Mr. Justice Brennan (then a Justice of the Supreme Court of New Jersey), used judicial claim reduction to achieve the "basic purpose" of New Jersey's contribution law: "to achieve the 'sharing of the common responsibility according to equity and natural justice'...." *Id.* at 92, 110 A.2d at 36, *quoting Sattelberger v. Telep*, 14 N.J. 353, 367, 102 A.2d 577, 584 (1954).[36] Claim reduction was found to be "clearly preferable" to "'blend the themes of compromise and contribution'":

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[35]As the court stated:

> It is true that in a case like the present one, where the verdict figure is in excess of twice the settlement figure, the application of this formula will necessarily reduce the amount of the injured plaintiff's recovery. However, the answer to objection to the formula on this account is that, by his settlement, the plaintiff has sold one-half of his claim for damages. Anything else would be unfair to the settling tort-feasor, who has bought his peace, and unfair to the defendant tort-feasor, who should not be disadvantaged by a settlement to which he was not a party and to which he did not consent.

300 F.2d at 724 (footnote omitted). *See also* Leger v. Drilling Well Control, Inc., 592 F.2d 1246, 1250 (5th Cir. 1979)("Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault."); Doyle v. United States, 441 F. Supp. 701, 712 n.5 (D.S.C. 1977)(nonsettling defendant should receive equitable reduction of verdict based upon settling defendant's proportionate share of total damages).

[36]The wrongful conduct involved in *Judson* was fraud, an intentional tort, to which the court held that New Jersey's contribution rules should apply. 17 N.J. at 87-91, 110 A.2d at 32-36; *see* pp. 19-22 *supra*.

> Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement by such a rule. He cannot complain of unfairness, since ". . . the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." *McKenna v. Austin*, [134 F.2d 659 (D.C. Cir. 1943)] *supra*. Thus, if the settlement is not collusive, he makes it upon the basis of his own appraisal of the risks of recovery and will hardly be deterred from it because it may later eventuate that he accepted less than the settler's *pro rata* share.

Id. at 93, 110 A.2d at 36-37.

The courts that have adopted claim-reduction rules have, as illustrated by the foregoing cases, sought to apply that contribution rule of fairness by carving out a proportionate share of the injured party's claim because of a partial settlement of that claim. In horizontal-restraint-of-trade cases, claim reduction based upon reduction of the plaintiffs' claim by an amount proportionately related to the settling defendants' sales of the products in question is a fair rule that would not increase the complexity of the litigation. In *Little Rock School District v. Borden, Inc.*, 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979), a district court applying the directive of the Court of Appeals for the Eighth Circuit to "fashion a rule of contribution which will protect the rights of settling defendants"[37] found claim reduction by elimination of claims based

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[37]Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979).

upon settling defendants' sales to be "the only possible viable alternate" in that horizontal price-fixing case. *Id.* at 77,252.

In such cases, the gains from higher-than-competitive prices are reaped by the wrongdoers on the basis of their relative shares of total sales of the product affected by their conduct.[38] Apportionment of liability on that basis, therefore, provides a fair approximation of each participant's gain from the conduct. Claim reduction on this basis also is free of administrative difficulties, because market shares are readily determinable and, if not the subject of a stipulation or otherwise to be found for purposes of the case, could be determined by the factfinder. Thus, such application of contribution rights brings about a fair treatment of all litigants while not undermining the goal of efficient management of antitrust litigation.

Moreover, such a rule will not discourage fair settlements. If parties wish to settle, they will do so. But they will do so on the basis of their assessment of the strengths and weaknesses of the claims and defenses involved, just exactly as they do in litigation that does not involve claims against multiple defendants. Only the demonstrated unfairness and realized opportunity for abuse brought about by a denial of contribution rights will be removed from the settlement process. This Court's sense of justice certainly should require no less.

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[38]In the *Corrugated Litigation*, the class action plaintiffs' entire settlement strategy was based upon settlement amounts demanded "per point" of each defendant's market share. Settlements were evaluated, negotiated and justified to the court as fair and reasonable on the basis of plaintiffs' calculations of each defendant's market share. *See* pp. 7-14 *supra*.

CONCLUSION

For all the foregoing reasons, Georgia-Pacific Corporation and Packaging Corporation of America respectfully submit that this Court should reverse the decision of the Court of Appeals for the Fifth Circuit and adopt an appropriate rule of contribution for antitrust cases.

Respectfully submitted,

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